

2021 Land Use Training

OVERVIEW

The “bundle of sticks”



The 5th (and 14th) amendment(s) of the US Constitution prohibit governments from taking all those sticks away without due process and just compensation.

OVERVIEW

However, governments can make some regulations that may take away some of the sticks if there is a greater public purpose.

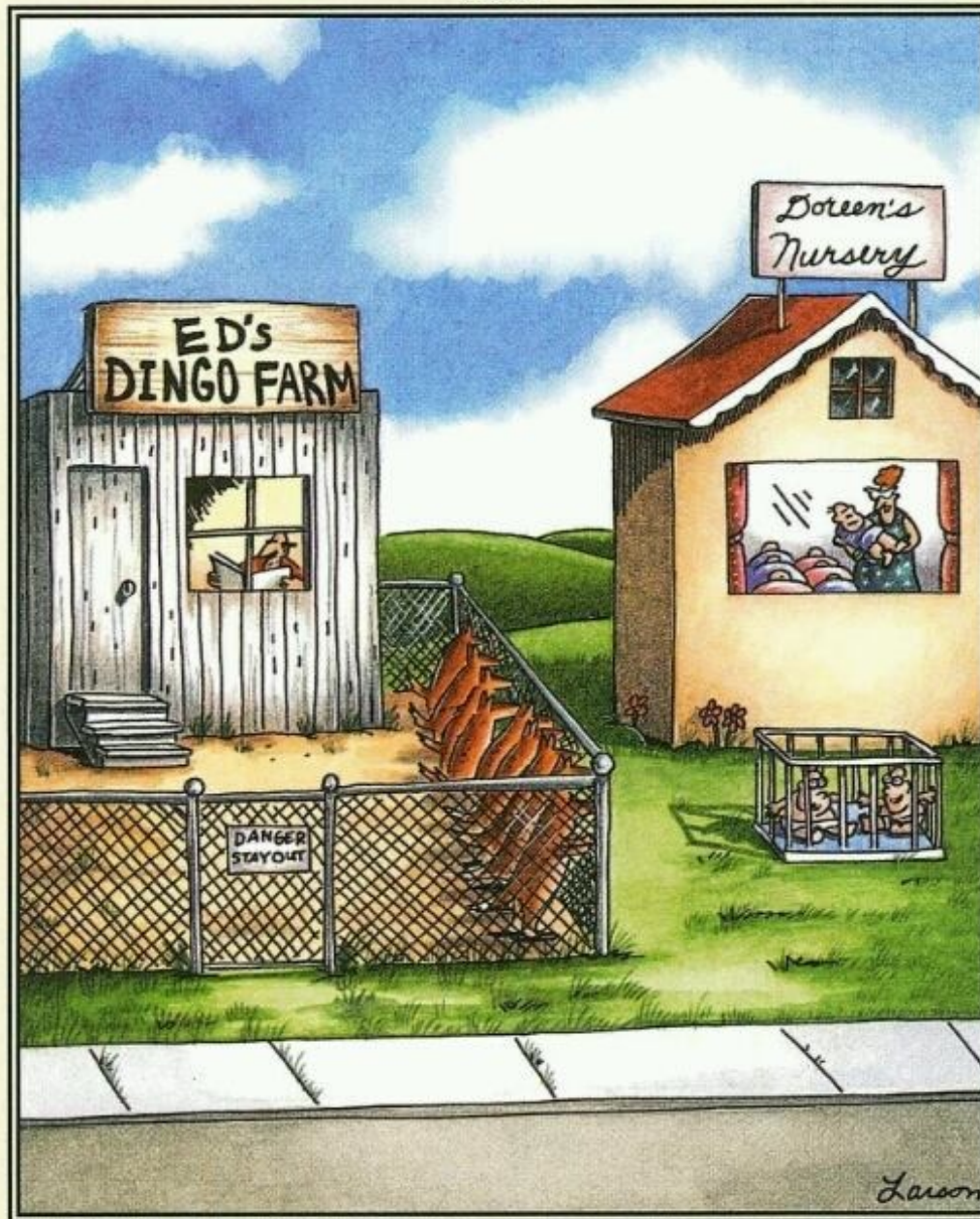


OVERVIEW

Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

Village of Euclid, Ohio v. Amber Realty Co., 272 U.S.
365, 387, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016
(1926)

1/9/90



Trouble brewing

The purpose of the County Land Use Management Act is to....

- A. Provide for the health, safety, and welfare of each county.
- B. Promote the prosperity, peace and good order of each county.
- C. Improve the morals and aesthetics of each county.
- D. All of the above.

Utah Code Ann. § 17-27a-102(1)(a)

“The purposes of this chapter are to provide for the **health, safety, and welfare**, and promote the **prosperity**, improve the **morals, peace and good order, comfort, convenience**, and **aesthetics** of each county and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, and to protect property values.”

PLANNING AND ZONING



Regulations

General Plan – The “Vision”

Development Code – the “Law”

Variance – the “Exception”

2 Types of Decisions

- Legislative Decisions
(is the decision creating law?)
- Administrative Decisions
(is the decision applying law?)

See Harmon City v. Draper, 2000 Ut App 31 ¶17, 18

Baker v. Carlson

2018 UT 59

“‘[L]egislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations.’ (quoting *Carter v. Lehi City*, 2012 UT 2, 269 P.3d 141)

¶14 This court also noted that this power is distinguishable from the executive—or administrative—power, which involves ‘applying the law to particular individuals or groups based on individual facts and circumstances.’” *Id.*

Legislative Decisions

Types:

- Re-zones

- Development Agreements

Differences:

- Public Clamor

- Policy consideration

- Challenge to decision

Referendums on land use

- Legislative decisions are referable for a vote of the people.
- Administrative land use decisions are not referable but may be appealed to District Court.

ADMINISTRATIVE ITEMS

Think “check the box”



What Can I Ask Them to Do?

Utah Code §17-27a-508

An applicant is **ENTITLED TO APPROVAL** ... if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect when the applicant submits a complete application and pays all application fees....

May **NOT** impose conditions on subdivision applications or existing permits that are not expressed in the development code or other county regulations and ordinances.

Conditional Use Permits

A conditional use is “a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.”

Staker v. Town of Springdale, 2020 UT App 174, ¶ 19 (see also Utah Code §17-27a-103(9))

IT IS AN **ALLOWED USE WITH
CONDITIONS IMPOSED TO
MITIGATE THE IMPACTS.**

Conditional Use Permits

Utah Code § 17-27a-506

1. Require compliance with Code (unless Code conflicts with state law)
2. Impose “reasonable” conditions to mitigate “anticipated detrimental effects”

Hypothetical

The Church of the Purple God would like to build a sacred temple on land zoned as “residential”. Churches are allowed in that zone as a Conditional Use.

The development code requires that all structures use only “natural” colors, however the Church believes the color purple to be sacred and an essential part of their worship.

Hypothetical

Also, all of their temples must be three stories tall with gold spires and steeples that must reach at least 70 feet above the building to reach God. The height limit in the zone is 32 feet.

The neighbors object and 500 people speak against the proposed temple at the public hearing.

Hypothetical

Among the concerns is traffic, lighting, and the claim that property values will be greatly reduced if the temple is built.

As a condition of approval, the planning commission would like the Church to build a new road from the highway to the Church (about 3 miles) to mitigate traffic concerns.

Question

The Planning Commission ultimately denied the CUP and the matter was appealed to you the County Commission (or County Council).

What Result?

Issues

1. Compliance with the Development Code
2. RLUIPA preemption
3. Public clamor
4. Mitigating Impacts
5. Exactions
6. Reasonable conditions

Conditions of Approval

- Traffic mitigation
- Lighting mitigation
- Hours of operation
- Noise
- Materials (reflective or not)

Exactions

“Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval.”

B.A.M. Development L.L.C. v. Salt Lake County, 2006 UT 2, ¶ 34 *citing* Salt Lake County v. Bd. Of Educ., 808 P.2d 1056, 1058 (Utah 1991).

Exactions

“They may ‘serve more than a single development’ and ‘may take the form of:

- (1) mandatory dedication of land for roads, schools or parks, as a condition to plat approval,
- (2) fees-in-lieu of mandatory dedication,
- (3) water or sewage connection fees, and
- (4) impact fees.”

B.A.M. Development L.L.C. v. Salt Lake County, 2006 UT 2, ¶ 34 *quoting* Salt Lake County v. Bd. Of Educ., 808 P.2d 1056, 1058 (Utah 1991).

Exactions and the Nollan/Dolan Test

- Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987)
- Dolan v. City of Tigard, 512 U.S. 374, 386 (1994)
- Utah Code Ann. § 17-27a-507 (2005)

A county may impose an exaction or exactions on development proposed in a land use application provided that:

- (1) an essential link exists between a legitimate governmental interest and each exaction; and
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

Impact Fees

“Impact fees are sums of money ‘imposed upon development activity as a condition of development approval.’” U.C.A. § 11-36-102(7)(a) (Supp. 2006). ***Heideman v. Washington City***, 2007 UT App 11 ¶ 2, fn 2.

Utah Code Ann. § 11-36-102(7)(a) defines Impact Fee

Utah Code Ann. §§ 11-36-201 and 11-36-202 set forth process and criteria

Utah Code Ann. § 53A-20-100.5 Prohibits School Impact Fees

Extortion?

Gillmor v. Thomas et. al., (district court docket no. 2:05-cv-00823, appellate court docket no. 06-4124)

Harvey v. Ute Indian Tribe,
2017 UT 75



Utah Code Ann. §17-27a-103(30) and (32)

(30) "**Land use decision**" means an **administrative decision** of a land use authority

(32) "**Land use regulation**": (a) means a **legislative decision** enacted by ordinance, law, code, map, resolution, specification, fee, or rule that governs the use or development of land;

Hypothetical

A development application comes before the Planning Commission for approval of a re-zone of the property and the building of a new high-rise hotel within the new zone.

Is the decision legislative or administrative?

Continued . . .

They neighbors hate it because it will block their view of the surrounding mountains. 200 people show up at a public hearing in protest of the project.

Two of the planning commissioners hate it because they want the County to buy it as open space.

QUESTION:

Can the planning commission say “no”?

Can they ask the applicant to build somewhere else?

Must they approve the project if it meets the code provisions but will ruin the neighborhood?

Continued . . .

Because of the “public clamor” the planning commission votes “no” on the project. The developer appeals to the District Court.

Will the developer win?

Vesting & Pending Ordinance Doctrine

1. Western Land Equities v. City of Logan, 617 P.2d 388 (Utah 1980)
2. **Utah Code Ann. § 17-27a-508**

VESTING: Process or Use?

PROCESS:

a **COMPLETED APPLICATION** needs to be processed under the Code version in place at the time the application was filed. It is VESTED to PROCESS under that code.

EXPIRATION: Depending on development Code, if applicant lets application go dormant for a period of time, the vesting and application ends.

USE:

An **APPROVED PROJECT** that has taken steps to affirm the approval (recorded a plat or site plat, built or started building infrastructure, etc. shall be VESTED for the USES granted under that APPROVAL.

EXPIRATION:

If the approval is not perfected within timeframe given in code OR
If the development is partially built but expires by its terms, the USES and DENSITY remains.

OPEN MEETINGS & DUE PROCESS

Utah Code §52-4-102(2):

It is the intent of the Legislature that the state, its agencies, and its political subdivisions:

- (a) take their actions openly; and
- (b) conduct their deliberations openly.



Due Process

Public Input v. Public Hearings

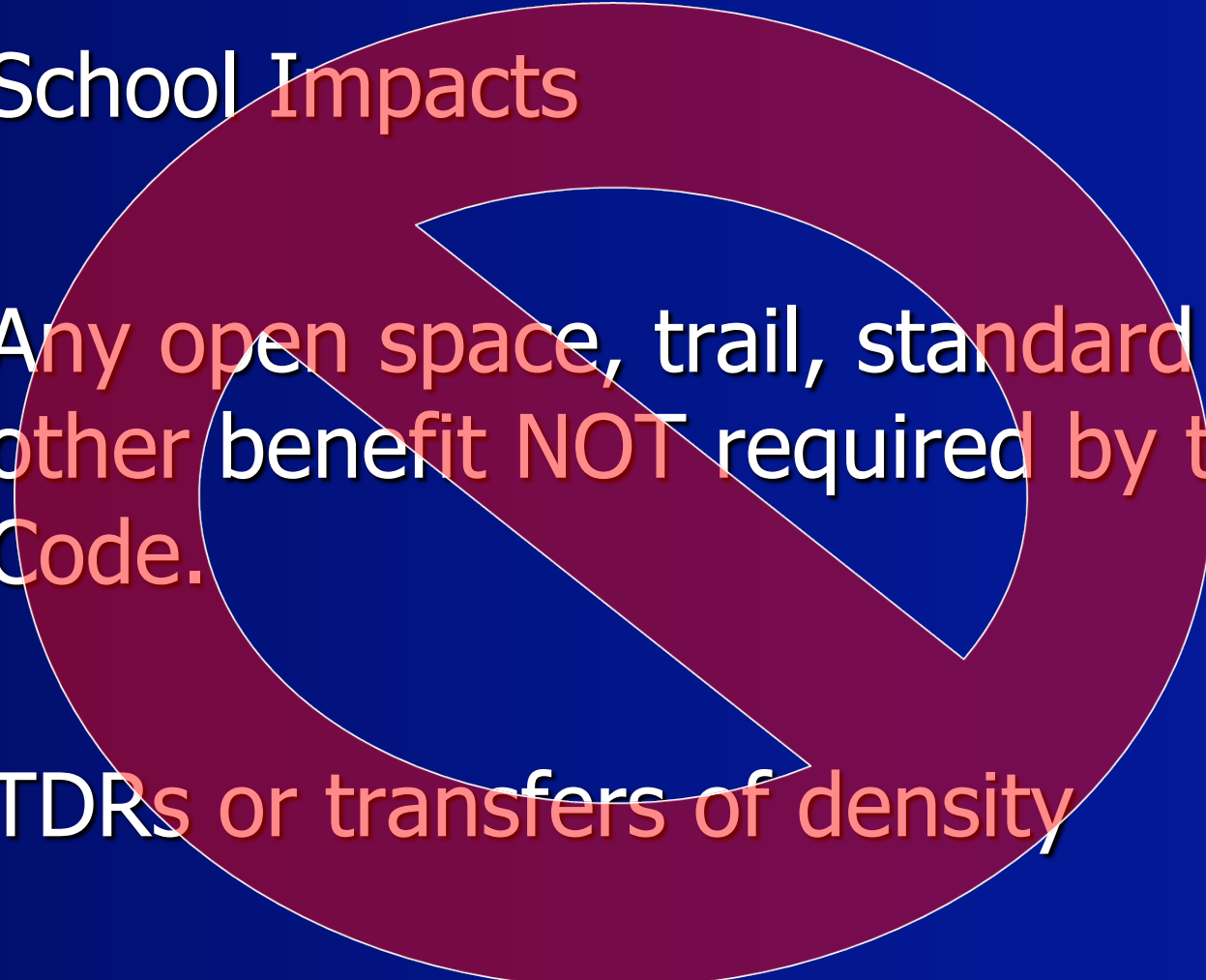
- a. What is “public input” and when is it appropriate?
DO NOT allow public input to be a public hearing
DO NOT allow public comment unless noticed as a public hearing.
- b. *Ex parte* communications
 - With the public
 - with each other

Be careful!

Murray v. Neth, 783 N.W.2d 424, 434 (Neb. 2010), the court held that **ex parte communications with a decision maker can give rise to violations of due process**

Professional Air Traffic Controllers Org. v. Federal Labor Relations Authority, 685 F.2d 547, 567 (CA DC 1982) the federal court ruled that **where the process was “irrevocably tainted” so as to make the ultimate judgment of the agency unfair, due process has been violated.**

What is Off the Table?

- 
1. School Impacts
 2. Any open space, trail, standard or other benefit NOT required by the Code.
 3. TDRs or transfers of density

STANDARD OF REVIEW

Utah Code Ann. § 17-27a-801 (3)

A decision, ordinance, or regulation involving the exercise of **legislative** discretion is valid if the decision, ordinance, or regulation is **reasonably debatable and not illegal**.

A final decision of a **land use authority** or an appeal authority is valid if the decision is supported by **substantial evidence in the record and is not arbitrary, capricious, or illegal**.

HAVE I MENTIONED **FINDINGS & CONCLUSIONS?**

WHO DO YOU REPRESENT?

"The nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.' "

Ronald Reagan 40th president of US (1911 - 2004)



Jest is for All



GLICK

"I'm bored. I am going to look for some kids building a sand castle and ask if they need any help with zoning issues."

WHAT SHOULD YOU KNOW?

- Know your General Plan & Code
- Know Land Use Management Act
- Findings & Conclusions are your friends

How to cover your Assets

QUALIFIED IMMUNITY

Act within the scope of your duties. Applying the code and following the advise of legal counsel, EVEN IF THEY ARE WRONG will protect you from law suits and cover you under the doctrine of qualified immunity.

Acting outside the scope opens you personally to litigation.

Which do you think makes more sense?

REMEMBER

In the area of planning and zoning It is not a matter of if litigation will be filed but when.

- Procedure is as important as substance.
- Substance is as important as process.
- Just because you can, doesn't mean you should.
- Just because you got away with it, doesn't make it right.
- Not getting caught is not the same as creating binding precedent.
- Public clamor doesn't necessarily equate to the public will.
- The public will doesn't necessarily equate to the public good.
- You are the government that the Bill of Rights was written to protect the people from.

David Church, Esq., *Land Use Primer*, Utah League of Cities & Towns
webpage <http://ulct.org>